



## Reports of Cases

### JUDGMENT OF THE COURT (First Chamber)

14 June 2012\*

(Directive 93/13/EEC — Consumer contracts — Unfair term concerning interest on late payments — Order for payment procedure — Powers of the national court)

In Case C-618/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Audiencia Provincial de Barcelona (Spain), made by decision of 29 November 2010, received at the Court on 29 December 2010, in the proceedings

**Banco Español de Crédito SA**

v

**Joaquín Calderón Camino,**

THE COURT (First Chamber),

composed of A. Tizzano (Rapporteur), President of the Chamber, M. Safjan, M. Ilešič, E. Levits and M. Berger, judges,

Advocate General: V. Trstenjak,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 1 December 2011,

after considering the observations submitted on behalf of:

- Banco Español de Crédito SA, by A. Herrador Muñoz, V. Betancor Sánchez and R. Rivero Sáez, abogados,
- the Spanish Government, by S. Centeno Huerta, acting as Agent,
- the German Government, by J. Kemper and T. Henze, acting as Agents,
- the European Commission, by M. Owsiany-Homung and E. Gippini Fournier, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 14 February 2012,

gives the following

\* Language of the case: Spanish.

## Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of:
  - Article 6(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29);
  - Article 2 of Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (OJ 2009 L 110, p. 30);
  - the provisions of Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure (OJ 2006 L 399, p. 1);
  - Articles 5(1)(l) and (m), 6, 7 and 10(2)(l) of Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (OJ 2008 L 133, p. 66); and
  - Article 11(2) of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') (OJ 2005 L 149, p. 22).
- 2 The reference has been made in the course of proceedings between Banco Español de Crédito SA ('Banesto') and Mr Calderón Camino concerning the payment of sums due under a consumer credit agreement concluded between those parties.

### The legal framework

#### *European Union legislation*

#### Directive 87/102/EEC

- 3 Article 6 of Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (OJ 1987 L 42, p. 48) provided:

'1. Notwithstanding the exclusion provided for in Article 2(1)(e), where there is an agreement between a credit institution or financial institution and a consumer for the granting of credit in the form of an advance on a current account, other than on credit card accounts, the consumer shall be informed at the time or before the agreement is concluded:

- of the credit limit, if any,
- of the annual rate of interest and the charges applicable from the time the agreement is concluded and the conditions under which these may be amended,
- of the procedure for terminating the agreement.

This information shall be confirmed in writing.

2. Furthermore, during the period of the agreement, the consumer shall be informed of any change in the annual rate of interest or in the relevant charges at the time it occurs. Such information may be given in a statement of account or in any other manner acceptable to Member States.

3. In Member States where tacitly accepted overdrafts are permissible, the Member States concerned shall ensure that the consumer is informed of the annual rate of interest and the charges applicable, and of any amendment thereof, where the overdraft extends beyond a period of three months.'

4 According to Article 7 of that directive:

'In the case of credit granted for the acquisition of goods, Member States shall lay down the conditions under which goods may be repossessed, in particular if the consumer has not given his consent. They shall further ensure that where the creditor recovers possession of the goods the account between the parties shall be made up so as to ensure that the repossession does not entail any unjustified enrichment.'

Directive 93/13

5 The twelfth recital in the preamble to Directive 93/13 states that:

'... however, as they now stand, national laws allow only partial harmonization to be envisaged; ... in particular, only contract terms which have not been individually negotiated are covered by this Directive; ... Member States should have the option, with due regard for the Treaty, to afford consumers a higher level of protection through national provisions that are more stringent than those of this Directive'.

6 The twenty-first recital in the preamble to that directive is worded as follows:

'... Member States should ensure that unfair terms are not used in contracts concluded with consumers by a seller or supplier and that if, nevertheless, such terms are so used, they will not bind the consumer, and the contract will continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair provisions'.

7 The twenty-fourth recital in the preamble to that directive states:

'... the courts or administrative authorities of the Member States must have at their disposal adequate and effective means of preventing the continued application of unfair terms in consumer contracts.'

8 Article 6 of Directive 93/13 provides that:

'1. Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.

2. Member States shall take the necessary measures to ensure that the consumer does not lose the protection granted by this Directive by virtue of the choice of the law of a non-Member country as the law applicable to the contract if the latter has a close connection with the territory of the Member States.'

9 Article 7(1) of that directive is worded as follows:

'Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.'

10 Article 8 of Directive 93/13 provides:

'Member States may adopt or retain the most stringent provisions compatible with the [EC] Treaty in the area covered by this Directive, to ensure a maximum degree of protection for the consumer.'

Directive 2005/29

11 Article 11(1) and (2) of Directive 2005/29 provides:

‘1. Member States shall ensure that adequate and effective means exist to combat unfair commercial practices in order to enforce compliance with the provisions of this Directive in the interest of consumers.

...

2. Under the legal provisions referred to in paragraph 1, Member States shall confer upon the courts or administrative authorities powers enabling them, in cases where they deem such measures to be necessary taking into account all the interests involved and in particular the public interest:

(a) to order the cessation of, or to institute appropriate legal proceedings for an order for the cessation of, unfair commercial practices;

or

(b) if the unfair commercial practice has not yet been carried out but is imminent, to order the prohibition of the practice, or to institute appropriate legal proceedings for an order for the prohibition of the practice,

even without proof of actual loss or damage or of intention or negligence on the part of the trader.

Member States shall also make provision for the measures referred to in the first subparagraph to be taken under an accelerated procedure:

— either with interim effect,

or

— with definitive effect,

on the understanding that it is for each Member State to decide which of the two options to select.

...’

Regulation No 1896/2006

12 Recital 10 in the preamble to Regulation No 1896/2006 states:

‘The procedure established by this Regulation should serve as an additional and optional means for the claimant, who remains free to resort to a procedure provided for by national law. Accordingly, this Regulation neither replaces nor harmonises the existing mechanisms for the recovery of uncontested claims under national law.’

13 Article 1 of Regulation No 1896/2006 provides:

‘1. The purpose of this Regulation is:

(a) to simplify, speed up and reduce the costs of litigation in cross-border cases concerning uncontested pecuniary claims by creating a European order for payment procedure;

and

(b) to permit the free circulation of European orders for payment throughout the Member States by laying down minimum standards, compliance with which renders unnecessary any intermediate proceedings in the Member State of enforcement prior to recognition and enforcement.

2. This Regulation shall not prevent a claimant from pursuing a claim within the meaning of Article 4 by making use of another procedure available under the law of a Member State or under Community law.’

Directive 2008/48

14 Article 1 of Directive 2008/48 is worded as follows:

‘The purpose of this Directive is to harmonise certain aspects of the laws, regulations and administrative provisions of the Member States concerning agreements covering credit for consumers.’

15 Under Article 5(1) of that directive:

‘In good time before the consumer is bound by any credit agreement or offer, the creditor and, where applicable, the credit intermediary shall, on the basis of the credit terms and conditions offered by the creditor and, if applicable, the preferences expressed and information supplied by the consumer, provide the consumer with the information needed to compare different offers in order to take an informed decision on whether to conclude a credit agreement. ...

The information in question shall specify:

...

(l) the interest rate applicable in the case of late payments and the arrangements for its adjustment, and, where applicable, any charges payable for default;

(m) a warning regarding the consequences of missing payments;

...’

16 Article 10(2) of Directive 2008/48 provides:

‘The credit agreement shall specify in a clear and concise manner:

...

(l) the interest rate applicable in the case of late payments as applicable at the time of the conclusion of the credit agreement and the arrangements for its adjustment and, where applicable, any charges payable for default;

...’

Directive 2009/22

17 Article 1(1) of Directive 2009/22 provides:

‘The purpose of this Directive is to approximate the laws, regulations and administrative provisions of the Member States relating to actions for an injunction referred to in Article 2 aimed at the protection of the collective interests of consumers included in the Directives listed in Annex I, with a view to ensuring the smooth functioning of the internal market.’

18 Under Article 2 of that directive:

‘1. Member States shall designate the courts or administrative authorities competent to rule on proceedings commenced by qualified entities within the meaning of Article 3 seeking:

(a) an order with all due expediency, where appropriate by way of summary procedure, requiring the cessation or prohibition of any infringement;

...

2. This Directive shall be without prejudice to the rules of private international law with respect to the applicable law, that is, normally, either the law of the Member State where the infringement originated or the law of the Member State where the infringement has its effects.’

*Spanish law*

19 Under Spanish law, consumers were initially protected against unfair terms by General Law 26/1984 for the protection of consumers and users (Ley General 26/1984 para la Defensa de los Consumidores y Usuarios) of 19 July 1984 (BOE No 176 of 24 July 1984, p. 21686; ‘Law 26/1984’).

20 Law 26/1984 was subsequently amended by Law 7/1998 on general contractual conditions (Ley 7/1998 sobre Condiciones Generales de la Contratación) of 13 April 1998 (BOE No 89 of 14 April 1998, p. 12304), which transposed Directive 93/13 into Spanish national law.

21 Lastly, Royal Legislative Decree 1/2007 approving the consolidated version of the General Law for the protection of consumers and users and other supplementary laws (Real Decreto Legislativo 1/2007 por el que se aprueba el texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias), of 16 November 2007 (BOE No 287 of 30 November 2007, p. 49181; ‘Legislative Decree 1/2007’), adopted the consolidated version of Law 26/1984, as amended.

22 Under Article 83 of Legislative Decree 1/2007:

‘1. Unfair contract terms shall be automatically void and deemed not to have formed part of the contract.

2. The part of the contract which has been deemed void shall be modified in accordance with the provisions of Article 1258 of the Civil Code and with the principle of good faith.

To that end, the court which rules that such terms are void shall modify the contract and shall enjoy moderating powers regarding the rights and obligations of the parties, where the contract continues in existence, and regarding the consequences of its being ruled ineffective in the event of significant loss or damage to the consumer or user.

Only where the remaining contract terms result in an imbalance in the respective positions of the parties which cannot be remedied may the court rule that the contract is ineffective.’

23 Article 1258 of the Spanish Civil Code provides:

‘Contracts are concluded by simple consent and from that point are binding, not only as to the performance of the matters expressly agreed, but also as to all consequences which, by their nature, are in accordance with good faith, custom and the law.’

24 As regards the order for payment procedure, the Code of Civil Procedure (Ley de Enjuiciamiento Civil), as applicable at the date on which the procedure which gave rise to the main proceedings was initiated, sets out, in Article 812(1) thereof, the conditions for the application of that procedure in the following terms:

‘Any person claiming from another the payment of an outstanding and payable pecuniary debt which does not exceed EUR 30 000 may use the order for payment procedure, where the amount of that debt is demonstrated by the following procedure:

- (1) either by the submission of documents, whatever their form, type or physical medium, signed by the debtor or bearing his or her stamp, mark or trade mark or any other sign, physical or electronic, originating from the debtor;
- (2) or by the submission of invoices, delivery notes, certificates, telegrams, facsimiles or any other documents which, even if created unilaterally by the creditor, are normally used to document credits and debts in relationships of such a type as that existing between the creditor and the debtor.

...’

25 Article 815(1) of the Code of Civil Procedure, entitled ‘Admissibility of the application and order for payment’, provides:

‘Where the documents attached to the application are included in those set out in Article 812(2) or constitute prima facie evidence of the right of the applicant, confirmed by the contents of the application, the Registrar shall order the debtor to pay the applicant within a period of 20 days and to provide evidence of that payment to the court or tribunal, or to appear before it and to state briefly, in the objection, the reasons for which he or she considers that he or she is not liable for all or part of the amount claimed...’

26 Article 818(1) of the Code of Civil Procedure, relating to the debtor’s objection, provides:

‘Where the debtor lodges an objection in due time, a definitive decision shall be made on the dispute after the appropriate procedure has been followed, whereupon the judgment shall acquire the force of *res judicata*.’

### **The dispute in the main proceedings and the questions referred for a preliminary ruling**

27 On 28 May 2007, Mr Calderón Camino entered into a loan agreement for the sum of EUR 30 000 with Banesto (‘the disputed agreement’) in order to purchase a vehicle which was to ‘meet the needs of the household’. The nominal interest rate was 7.950%, the APR (Annual Percentage Rate of Charge) 8.890% and the rate of interest on late payments 29%.

28 Although the term of the disputed agreement was fixed at 5 June 2014, Banesto took the view that it had expired before that date on the ground that, in September 2008, reimbursement of 7 monthly repayments had not yet been made. Thus, on 8 January 2009, it submitted, before the Juzgado de Primera Instancia No 2 de Sabadell (Court of First Instance, No 2, Sabadell), in accordance with Spanish law, an application for an order for payment in the amount of EUR 29 381.95, corresponding to the unpaid monthly repayments plus contractual interest and costs.

29 On 21 January 2010, the Juzgado de Primera Instancia No 2 de Sabadell issued an order in which it held, first, that the disputed agreement was a pre-formulated standard contract, concluded without any real opportunities for negotiation and including imposed general conditions and, secondly, that the 29% rate of interest for late payment was fixed in a typed term which could not be distinguished from the rest of the text as regards the font, the size of the letters used or any specific acceptance by the consumer.

- 30 In those conditions and, having regard to, inter alia, the Euribor ('Euro interbank offered rate') and European Central Bank (ECB) rates of interest, and to the fact that the rate of interest for late payment in the agreement was more than 20 points greater than that of the nominal interest rate, the Juzgado de Primera Instancia No 2 de Sabadell held of its own motion that the term relating to interest for late payment was automatically void, on the ground that it was unfair, referring to the settled case-law of the Court of Justice on this matter. It also fixed that rate at 19%, referring to the statutory rate of interest and to the rates of interest for late payment included in national budget laws from 1990 to 2008, and ordered Banesto to recalculate the amount of interest for the period at issue in the dispute before it.
- 31 Banesto appealed against that order to the Audiencia Provincial de Barcelona (Provincial Court, Barcelona), submitting, in essence, that the Juzgado de Primera Instancia No 2 de Sabadell could not, at that stage of the procedure, hold of its own motion that the contractual term relating to interest for late payment, which it considered to be unfair, was void or modify that contractual term.
- 32 In the order for reference, the Audiencia Provincial de Barcelona found, first, that the Spanish legislation on the protection of the interests of consumers and users does not empower the courts before which an application for order for payment has been brought to hold, of their own motion and *in limine litis*, that unfair contract terms are void, as the assessment of the lawfulness of such terms falls within the procedure under general national law, which is initiated only in the event that a debtor lodges an objection.
- 33 As regards, second, European Union law, that court observed that the case-law of the Court of Justice has, it is true, interpreted Article 6(1) of Directive 93/13 to mean that national courts are required to raise, of their own motion, the issue as to whether an unfair term is void and/or inapplicable, even where none of the parties to the contract has made an application to that effect.
- 34 However, according to the referring court, Regulation No 1896/2006, which specifically governs orders for payment at European Union level, does not establish a procedure for the examination, of a court's own motion and *in limine litis*, of unfair terms, but merely lists a series of requirements and information which must be provided to consumers.
- 35 Likewise, neither Directive 2008/48, on consumer credit agreements, nor Directive 2009/22, relating to injunctions against infringements harmful to consumers' interests, provides for procedural mechanisms which require national courts to hold, of their own motion, that a term such as that contained in the disputed agreement is void.
- 36 Lastly, even if the practice of introducing into a contract concluded between a seller or supplier and a consumer a term relating to interest on late payments is considered to be 'unfair', within the meaning of Directive 2005/29, since Law 29/2009 amending the statutory rules governing unfair competition and advertising in order to improve the protection of consumers and users (Ley 29/2009 por la que se modifica el régimen legal de la competencia desleal y de la publicidad para la mejora de la protección de los consumidores y usuarios), of 30 December 2009 (BOE No 315, of 31 December 2009, p. 112039), did not transpose Article 11(2) of that directive into Spanish law, the national courts do not, in any event, have the power to examine of their own motion whether that practice is unfair.
- 37 It is in those circumstances that the Audiencia Provincial de Barcelona, entertaining doubts as to the correct interpretation of European Union law, decided to stay the proceedings and to refer to the Court the following questions for a preliminary ruling:
- '(1) Is it contrary to [European Union] law, in particular the law on consumers and users, for a national court to avoid giving a ruling of its own motion and *in limine litis* or at any stage during the proceedings on whether or not a term concerning interest on late payments (in this case 29%) in a consumer credit agreement is void and on whether or not that term should be modified? May

the court, without prejudicing the rights of the consumer under [European Union] law, decide to leave any evaluation of such a term to the initiative of the debtor (by means of the appropriate procedural objection)?

- (2) In the light of Article 6(1) of Directive [93/13] and Article 2 of Directive [2009/22], what is the correct interpretation of Article 83 of [Legislative Decree 1/2007] ...for those purposes? What is the scope, in that regard, of Article 6(1) of Directive [93/13] where it provides that unfair contract terms “shall not be binding on the consumer”?
- (3) Is it possible to exclude judicial review of a court’s own motion and *in limine litis* where the applicant clearly states in his application the rate of interest on late payments, the amount of the claim, including the principal and interest, the contractual penalties and the costs, the interest rate and the period of time for which that interest is demanded (or a statement that statutory interest is automatically added to the principal under the law of the Member State of origin), the cause of the action, including a description of the facts relied on as the basis of the claim and the interest demanded, and it is clearly stated whether it concerns statutory or contractual interest, capitalisation of interest or the interest rate for the loan, whether it has been calculated by the applicant and the number of percentage points above the Central Bank base rate, as is the case with [Regulation No 1896/2006] on the European order for payment procedure?
- (4) In the absence of their transposition, do Articles 5(1)(l) and (m) and 6(1)(i) of Directive [2008/48], where they refer to “arrangements for its adjustment”, and Article 10(2)(1), where it refers to “arrangements for its adjustment”, require the financial institution specifically to include and to highlight in the contract (not in the body of the text, in an undifferentiated manner) as “pre-contractual information” references to the interest rate applicable in the case of late payments, in the event of default, set out clearly and in a prominent place, and the elements taken into account when determining them (financial costs, recovery costs etc.) and to include a warning regarding the consequences connected with those cost elements?
- (5) Does Article 6(2) of Directive [2008/48] include the requirement to notify the early termination of a credit or loan agreement which gives rise to the charging of interest on late payments? Is the principle of the prohibition of unjustified enrichment contained in Article 7 of Directive [2008/48] applicable where the credit institution seeks not only the recovery of the goods (the loan capital), but also the application of an especially high rate of interest on late payments?
- (6) In the absence of any transposing provision and in the light of Article 11(2) of Directive [2005/29], may the court find of its own motion that it is an unfair practice to include in a contract a term concerning interest on late payments?

### **The questions referred for a preliminary ruling**

#### *The first question*

- 38 By its first question, the referring court is essentially asking whether Directive 93/13 must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, which does not allow the court before which an application for an order for payment has been brought to assess of its own motion, *in limine litis* or at any other stage during the proceedings, whether a term relating to interest on late payments contained in a contract concluded between a seller or supplier and a consumer is unfair, in the case where that consumer has not lodged an objection.
- 39 For the purpose of replying to that question, it is appropriate to note, first, that the system of protection introduced by Directive 93/13 is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being

able to influence the content of those terms (Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial and Salvat Editores* [2000] ECR I-4941, paragraph 25; Case C-168/05 *Mostaza Claro* [2006] ECR I-10421, paragraph 25; and Case C-40/08 *Asturcom Telecomunicaciones* [2009] ECR I-9579, paragraph 29).

- 40 As regards that weaker position, Article 6(1) of Directive 93/13 provides that unfair terms are not binding on the consumer. As is apparent from the case-law, that is a mandatory provision which aims to replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them (see *Mostaza Claro*, paragraph 36; *Asturcom Telecomunicaciones*, paragraph 30; Case C-137/08 *VB Pénzügyi Lízing* [2010] ECR I-10847, paragraph 47; and C-453/10 *Pereničová and Perenič* [2012] ECR, paragraph 28).
- 41 In order to guarantee the protection intended by Directive 93/13, the Court has already stated on several occasions that the imbalance which exists between the consumer and the seller or supplier may be corrected only by positive action unconnected with the actual parties to the contract (see *Océano Grupo Editorial and Salvat Editores*, paragraph 27; *Mostaza Claro*, paragraph 26; *Asturcom Telecomunicaciones*, paragraph 31; and *VB Pénzügyi Lízing*, paragraph 48).
- 42 It is in the light of those principles that the Court has therefore held that the national court is required to assess of its own motion whether a contractual term falling within the scope of Directive 93/13 is unfair, compensating in this way for the imbalance which exists between the consumer and the seller or supplier (see, to that effect, *Mostaza Claro*, paragraph 38; Case C-243/08 *Pannon GSM* [2009] ECR I-4713, paragraph 31; *Asturcom Telecomunicaciones*, paragraph 32; and *VB Pénzügyi Lízing*, paragraph 49).
- 43 Consequently, the role attributed to the national court by European Union law in this area is not limited to a mere power to rule on the possible unfairness of a contractual term, but also consists of the obligation to examine that issue of its own motion, where it has available to it the legal and factual elements necessary for that task (see *Pannon GSM*, paragraph 32).
- 44 In this connection, in ruling on an order for reference submitted by a national court before which *inter partes* proceedings, initiated following an objection lodged by a consumer against an order for payment, had been brought, the Court held that that national court must investigate of its own motion whether a term conferring exclusive territorial jurisdiction in a contract concluded between a seller or supplier and a consumer falls within the scope of Directive 93/13 and, if it does, assess of its own motion whether such a term is unfair (*VB Pénzügyi Lízing*, paragraph 56).
- 45 However, the present case can be distinguished from those which gave rise to the abovementioned judgments in *Pannon GSM* and *VB Pénzügyi Lízing* by the fact that it concerns the definition of the national court's responsibilities pursuant to the provisions of Directive 93/13, in the context of an order for payment procedure, before the consumer has lodged an objection.
- 46 In this regard, in the absence of harmonisation of the national mechanisms for recovery of uncontested claims, the rules implementing national order for payment procedures are a matter for the national legal order, in accordance with the principle of the procedural autonomy of the Member States, on condition, however, that they are no less favourable than those governing similar domestic actions (principle of equivalence) and do not make it in practice impossible or excessively difficult to exercise the rights conferred on consumers by European Union law (principle of effectiveness) (see, to that effect, *Mostaza Claro*, paragraph 24, and *Asturcom Telecomunicaciones*, paragraph 38).
- 47 As regards the principle of equivalence, it must be observed that the Court does not have before it any evidence which might raise doubts as to the compliance of the legislation at issue in the main proceedings with that principle.

- 48 It is apparent from the case-file that the Spanish procedural system does not allow the national court before which an application for an order for payment has been brought to assess of its own motion, *in limine litis* or at any other stage during the proceedings, either whether a term contained in a contract concluded between a seller or supplier and a consumer is unfair in the light of Article 6 of Directive 93/13 where that consumer has not lodged an objection, or whether such a term conflicts with national rules of public policy. It is nevertheless for the national court to ascertain such matters.
- 49 As regards the principle of effectiveness, it is the Court's settled case-law that every case in which the question arises as to whether a national procedural provision makes the application of European Union law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national bodies (see *Asturcom Telecomunicaciones*, paragraph 39 and the case-law cited).
- 50 In the present case, it is apparent from the file submitted to the Court that, in accordance with Article 812 of the Spanish Code of Civil Procedure, the order for payment procedure applies to outstanding, liquid and payable pecuniary debts which do not exceed a certain value, which was EUR 30 000 at the material time.
- 51 In order to ensure that creditors have easier access to justice and that the procedure operates more rapidly, that article provides only that creditors must enclose with the application documents proving that the debt exists, without obliging them to state clearly the rate of interest for late payments, the precise period over which the debt is payable and the reference point of that rate in relation to the statutory rate of interest under national law or the European Central Bank rate.
- 52 Thus, under Articles 815(1) and 818(1) of the Code of Civil Procedure, the national court before which an application for an order for payment has been brought has jurisdiction merely to ascertain whether the formal conditions for the initiation of that procedure exist, and, if so, it must allow the application before it and issue an enforceable order, without being able to examine, *in limine litis* or at any other stage of the procedure, the justification for the application in the light of the information available to it, unless the debtor refuses to pay his debt or lodges an objection within 20 days of the date on which that order to pay was notified. That objection must be made with the assistance of a lawyer in respect of cases exceeding a value prescribed by statute, which was EUR 900 at the date of the facts which gave rise to the dispute in the main proceedings.
- 53 In that context, it must be stated that such a procedural arrangement, which completely prevents the court before which an application for order for payment has been brought to assess of its own motion, *in limine litis* or at any other stage during the proceedings, even though it already has all the legal and factual elements necessary for that task available to it, whether terms contained in a contract concluded between a seller or supplier and a consumer are unfair where that consumer has not lodged an objection, is liable to undermine the effectiveness of the protection intended by Directive 93/13 (see, to that effect, Case C-473/00 *Cofidis* [2002] ECR I-10875, paragraph 35).
- 54 In the light of the order for payment procedure described in paragraphs 50 to 52 of this judgment, its progress and its special features, viewed as a whole, there is a significant risk that the consumers concerned will not lodge the objection required either because of the particularly short period provided for that purpose, or because they might be dissuaded from defending themselves in view of the costs which legal proceedings would entail in relation to the amount of the disputed debt, or because they are unaware of or do not appreciate the extent of their rights, or indeed because of the limited content of the application for the order for payment submitted by the sellers or suppliers, and thus the incomplete nature of the information available to them.
- 55 Thus, it is sufficient for sellers or suppliers to initiate an order for payment procedure instead of an ordinary civil procedure in order to deprive consumers of the benefit of the protection intended by Directive 93/13. This is also contrary to the Court's case-law, according to which the specific

characteristics of court proceedings which take place under national law between sellers or suppliers and consumers cannot constitute a factor which is liable to affect the legal protection from which consumers must benefit under the provisions of that directive (*Pannon GSM*, paragraph 34).

56 In those circumstances, it must be held that the Spanish legislation at issue in the main proceedings appears not to comply with the principle of effectiveness, in so far as it makes impossible or excessively difficult, in proceedings initiated by sellers or suppliers in which consumers are defendants, the application of the protection which Directive 93/13 seeks to confer on those consumers.

57 In the light of those considerations, the answer to the first question is that Directive 93/13 must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, which does not allow the court before which an application for an order for payment has been brought to assess of its own motion, *in limine litis* or at any other stage during the proceedings, even though it already has the legal and factual elements necessary for that task available to it, whether a term concerning interest on late payments contained in a contract concluded between a seller or supplier and a consumer is unfair, in the case where that consumer has not lodged an objection.

#### *The second question*

58 In order to provide an interpretation of European Union law which will be of use to the referring court (see, to that effect, Case C-213/07 *Michaniki* [2008] ECR I-9999, paragraphs 50 and 51), it is necessary to construe the second question as asking, essentially, whether Articles 2 of Directive 2009/22 and 6(1) of Directive 93/13 preclude legislation of a Member State, such as that laid down in Article 83 of Legislative Decree 1/2007, which allows a national court, in the case where it finds that an unfair term in a contract concluded between a seller or supplier and a consumer is void, to modify that contract by revising the content of that term.

59 It must first be observed in this connection that the dispute in the main proceedings takes place within the framework of an order for payment procedure initiated by one of the contracting parties and not in the context of an injunction sought by a 'qualified entity' within the meaning of Article 3 of Directive 2009/22.

60 Consequently, since that latter directive is not applicable to the dispute in the main proceedings, there is no need to rule on the interpretation of Article 2 thereof.

61 That being so, in order to answer the question posed concerning the consequences to be drawn from the finding that a contractual term is unfair, it is necessary to refer both to the wording of Article 6(1) of Directive 93/13 and to the objectives and overall scheme of that provision (see, to that effect, Case C-482/07 *AHP Manufacturing* [2009] ECR I-7295, paragraph 27, and Case C-125/10 *Merck Sharp & Dohme Corp.* [2011] ECR I-12987, paragraph 29).

62 With regard to the wording of Article 6(1), it must be held, firstly, that the first part of the sentence in that provision, while granting the Member States a certain degree of autonomy so far as concerns the definition of the legal arrangements applicable to unfair terms, nevertheless expressly requires them to provide that those terms 'shall ... not be binding on the consumer'.

63 In that context, the Court has already had the opportunity to interpret that provision as meaning that it is a matter for national courts, when they find that contract terms are unfair, to draw all the consequences that follow under national law, in order that the consumer will not be bound by those terms (see *Asturcom Telecomunicaciones*, paragraph 58; order in Case C-76/10 *Pohotovost'* [2010] ECR I-11557, paragraph 62; and *Pereničová and Perenič*, paragraph 30). As has been pointed out in paragraph 40 of this judgment, that is a mandatory provision which aims to replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them.

- 64 Secondly, the European Union legislature explicitly laid down, in the second part of the sentence in Article 6(1) of Directive 93/13 and in the twenty-first recital in the preamble to that directive, that the contract concluded between the seller and supplier will continue to bind the parties ‘upon those terms’ if it is capable of continuing in existence ‘without the unfair provisions’.
- 65 It thus follows from the wording of Article 6(1) that the national courts are required only to exclude the application of an unfair contractual term in order that it does not produce binding effects with regard to the consumer, without being authorised to revise its content. That contract must continue in existence, in principle, without any amendment other than that resulting from the deletion of the unfair terms, in so far as, in accordance with the rules of domestic law, such continuity of the contract is legally possible.
- 66 That interpretation is, moreover, borne out by the objective and overall scheme of Directive 93/13.
- 67 According to the Court’s settled case-law, that directive as a whole constitutes a measure which is essential to the accomplishment of the tasks entrusted to the European Union and, in particular, to raising the standard of living and the quality of life throughout the European Union (see *Mostaza Claro*, paragraph 37; *Pannon GSM*, paragraph 26; and *Asturcom Telecomunicaciones*, paragraph 51).
- 68 Thus, given the nature and significance of the public interest which constitutes the basis of the protection guaranteed to consumers, who are in a weak position vis-à-vis sellers or suppliers, Directive 93/13 requires Member States, as is apparent from Article 7(1) thereof, read in conjunction with the twenty-fourth recital in the preamble thereto, to provide for adequate and effective means ‘to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers’.
- 69 In that context, it is clear, as the Advocate General observed in points 86 to 88 of her Opinion, that, if it were open to the national court to revise the content of unfair terms included in such contracts, such a power would be liable to compromise attainment of the long-term objective of Article 7 of Directive 93/13. That power would contribute to eliminating the dissuasive effect on sellers or suppliers of the straightforward non-application with regard to the consumer of those unfair terms (see, to that effect, the order in *Pohotovost’*, paragraph 41 and the case-law cited), in so far as those sellers or suppliers would remain tempted to use those terms in the knowledge that, even if they were declared invalid, the contract could nevertheless be modified, to the extent necessary, by the national court in such a way as to safeguard the interest of those sellers or suppliers.
- 70 Accordingly, such a power, were it granted to the national court, would not be such as to ensure, by itself, such efficient protection of the consumer as that resulting from non-application of the unfair terms. Moreover, neither could that power be based on Article 8 of Directive 93/13, which leaves Member States the option to adopt or retain, in the area covered by that directive, more stringent provisions compatible with European Union law, inasmuch as they ensure a higher level of consumer protection (see Case C-484/08 *Caja de Ahorros y Monte de Piedad de Madrid* [2010] ECR I-4785, paragraphs 28 and 29, and *Pereničová and Perenič*, paragraph 34).
- 71 It follows, therefore, that Article 6(1) of Directive 93/13 cannot be understood as allowing the national court, in the case where it finds that there is an unfair term in a contract concluded between a seller or supplier and a consumer, to revise the content of that term instead of merely setting aside its application to the consumer.
- 72 In that regard, it is for the referring court to ascertain what the national rules applicable to the dispute before it are and to do whatever lies within its jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by domestic law, with a view to ensuring that Article 6(1) of Directive 93/13 is fully effective and achieving an outcome consistent with the objective pursued by it (see, to that effect, Case C-282/10 *Dominguez* [2012] ECR, paragraph 27 and the case-law cited).

73 In the light of the foregoing, the answer to the second question is that Article 6(1) of Directive 93/13 must be interpreted as precluding legislation of a Member State, such as Article 83 of Legislative Decree 1/2007, which allows a national court, in the case where it finds that an unfair term in a contract concluded between a seller or supplier and a consumer is void, to modify that contract by revising the content of that term.

*The third to sixth questions*

74 By its third to sixth questions, the referring court in essence asks the Court, firstly, as to the responsibilities of national courts under Regulation No 1896/2006 and Directive 2005/29 in the case where they review a contractual term concerning interest on late payments such as that at issue in the main proceedings and, secondly, as to the obligations on financial institutions for the purposes of the application in credit agreements of the interest rate applicable in the event of late payments, as provided for in Articles 5(1)(l) and (m), 6, 7 and 10(2)(l) of Directive 2008/48.

75 The Kingdom of Spain and the European Commission contend that those questions are inadmissible, in so far as the rules of European Union law to which they relate are not applicable to the dispute in the main proceedings and that, consequently, the interpretation of those rules cannot aid the referring court in resolving that dispute.

76 In that regard, it is necessary to state at the outset that, in accordance with settled case-law, in proceedings under Article 267 TFEU, which are based on a clear separation of functions between the national courts and the Court of Justice, the national court alone has jurisdiction to find and assess the facts in the case before it and to interpret and apply national law. Similarly, it is solely for the national court, before which the dispute has been brought and which must assume responsibility for the judicial decision to be made, to determine, in the light of the particular circumstances of the case, both the need for and the relevance of the questions that it submits to the Court. Consequently, where the questions submitted concern the interpretation of European Union law, the Court is in principle bound to give a ruling (Case C-145/03 *Keller* [2005] ECR I-2529, paragraph 33; Case C-119/05 *Lucchini* [2007] ECR I-6199, paragraph 43; and Case C-11/07 *Eckelkamp and Others* [2008] ECR I-6845, paragraphs 27 and 32).

77 Thus, the Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of European Union law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, Joined Cases C-94/04 and C-202/04 *Cipolla and Others* [2006] ECR I-11421, paragraph 25, and Joined Cases C-570/07 and C-571/07 *Blanco Pérez and Chao Gómez* [2010] ECR I-4629, paragraph 36).

78 It must, however, be held that that is precisely the position in the present case.

79 In particular, as regards the third question, the interpretation of Regulation No 1896/2006 is irrelevant with regard to the decision which the referring court is called upon to give in the dispute before it. Firstly, as is apparent from the file submitted to the Court, the facts of the dispute in the main proceedings do not come within the scope of that regulation, which, in accordance with Article 1(1) thereof, concerns only cross-border cases, but remain subject exclusively to the provisions of the Spanish Code of Civil Procedure. Secondly, it is important to state that that regulation, as recital 10 in the preamble thereto expressly indicates, neither replaces nor harmonises the existing mechanisms for the recovery of uncontested claims under national law.

80 So far as the fourth question is concerned, it is clear that the provisions of Articles 5(1)(l) and (m), 6 and 10(2)(l) of Directive 2008/48, the interpretation of which is sought by the referring court, do not apply *ratione temporis* to the dispute in the main proceedings, in so far as that dispute concerns the allegedly incorrect performance by Mr Calderón Camino of the credit agreement into which he entered on 28 May 2007 with Banesto.

- 81 Suffice it in this connection to note that, in accordance with Articles 27, 29 and 31 of Directive 2008/48, that directive entered into force on 11 June 2008 and the Member States were required to have adopted the measures necessary to comply with that directive before 11 June 2010, the date with effect from which Directive 87/102 was repealed. In addition, Article 30(1) of Directive 2008/48 expressly provides that it does not apply to credit agreements existing on the date on which the national implementing measures entered into force.
- 82 As for the fifth question, which seeks to ascertain, firstly, whether Article 6(2) of Directive 2008/48 imposes an obligation on the credit institution to notify the early termination of a credit or loan agreement in order to be able to charge interest on late payments and, secondly, whether the principle of the prohibition of unjustified enrichment contained in Article 7 of that directive may be relied upon in the case where that credit institution not only requests reimbursement of the capital but also seeks particularly high interest for late payment, it must be observed at the outset that, by that question, as is apparent from the file submitted to the Court, the referring court in fact intended to refer to the corresponding articles of Directive 87/102, which are the only articles that match the subject-matter of that question.
- 83 However, even if it is accepted that that is the real scope of the fifth question (see, to that effect, Case C-107/98 *Teckal* [1999] ECR I-8121, paragraphs 34 and 39), it is necessary to state that, as the Advocate General also observed in points 99 and 100 of her Opinion, there is nothing in the order for reference to suggest that the dispute in the main proceedings relates to an issue concerning either the obligation to give prior notice to the consumer with regard to any change in the annual rate of interest or the restitution of goods to the creditor which gives rise to unjustified enrichment of the latter.
- 84 It is thus evident that the fifth question is hypothetical in nature, since the interpretation of those provisions of Directive 87/102 bears no connection to the subject-matter of the dispute in the main proceedings.
- 85 As regards, lastly, the sixth question, which seeks to establish whether, in the case where Directive 2005/29 has not been transposed, Article 11(2) thereof must be interpreted as meaning that a national court may find of its own motion that it is an unfair practice to include in a contract a term concerning interest on late payments, suffice it to state, as the Advocate General also mentioned in point 106 of her Opinion, that there is nothing in the order for reference to indicate that the Juzgado de Primera Instancia No 2 de Sabadell, having issued the order rejecting the application for an order for payment, considered to be an unfair commercial practice, within the meaning of the abovementioned directive, the fact that Banesto had included in the credit agreement into which it entered with Mr Calderón Camino a term concerning interest on late payments such as that at issue in the main proceedings.
- 86 It must also be stated that, in its decision, the referring court expands on considerations explaining that question, referring expressly to the ‘possible unfair practice of the banking institution’.
- 87 Consequently, it is evident that the interpretation of Directive 2005/29 is purely hypothetical in the light of the subject-matter of the dispute in the main proceedings. In that context, the fact that that directive has not been transposed is also irrelevant for the purposes of the resolution of that dispute.
- 88 In the light of the foregoing, the third to sixth questions submitted by the referring court must therefore be declared inadmissible.

## Costs

- <sup>89</sup> Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

- 1. Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, which does not allow the court before which an application for an order for payment has been brought to assess of its own motion, *in limine litis* or at any other stage during the proceedings, even though it already has the legal and factual elements necessary for that task available to it, whether a term relating to interest on late payments contained in a contract concluded between a seller or supplier and a consumer is unfair, in the case where that consumer has not lodged an objection.**
- 2. Article 6(1) of Directive 93/13 must be interpreted as precluding legislation of a Member State, such as Article 83 of Royal Legislative Decree 1/2007 approving the consolidated version of the General Law for the protection of consumers and users and other supplementary laws (Real Decreto Legislativo 1/2007 por el que se aprueba el texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias) of 16 November 2007, which allows a national court, in the case where it finds that an unfair term in a contract concluded between a seller or supplier and a consumer is void, to modify that contract by revising the content of that term.**

[Signatures]